U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 18 July 2005

CASE NO. 2003-LHC-00743

OWCP NO. 14-133395

In the Matter of:

JOSEPH WARREN,
Claimant,

v.

LOCKHEED SHIPBUILDING, and **LABORERS' LOCAL 252,**
Employer,
and

LIBERTY NW INSURANCE CO.,
Carrier,

Before: Judge Gerald M. Etchingham
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. ("Act"), and the regulations promulgated there under. Joseph Warren ("Claimant") filed suit against Lockheed Shipbuilding ("Lockheed") and Liberty NW Insurance Company for an injury he had developed while employed by Lockheed from 1966 to 1983. This matter came to the Office of the Administrative Law Judges for formal hearing from the District Director of the Office of Workers' Compensation Programs. Laborers' Local 252 ("Local 252") was joined as an additional employer and defendant by Lockheed's motion, over Claimant and Local 252's objections.

This matter was heard in Seattle, Washington on September 14, 2004. Claimant, and counsel for all parties appeared and participated at trial. At trial, ALJ Exhibits 1-6 were admitted, as were Claimant Exhibits ("CX") 1-10, and Lockheed Exhibits ("LX") 1-9. LX 8 was withdrawn. Union 252 did not submit any exhibits. Dorothy Muto-Coleman's deposition was admitted after trial as CX 11 with no objections. At the conclusion of trial, Lockheed also submitted the telephone deposition of Andrew Posewitz ("Posewitz DP") into evidence. Post-trial briefs were submitted by Local 252, Claimant , and Employer and received on November 9 (ALJX 7), November 12 (ALJX 8), and November 12 (ALJX 9), 2004, respectively. ALJXs 7-9 are admitted into the record without objections.

For the reasons set forth below, Local 252 is absolved of liability for Claimant's present injury under the Act, and Claimant is awarded medical, permanent partial disability benefits, and attorney fees and costs against Employer.

Stipulations:

1. Claimant's hearing loss injury arose out of and in the course and scope of Claimant's employment with Employer;
2. Claimant noticed and filed a timely claim for compensation on July 15, 2000 and Employer controverted the claim on August 2, 2000;
3. During Claimant's employment with Employer, Claimant had maritime status and situs;
4. The Act applies to Claimant's claim against Employer;
5. Claimant is entitled to compensation and medical benefits;
6. Claimant has reached maximum medical improvement.

TR at 10-15. Because there is substantial evidence in the record to support the foregoing stipulations, I accept them.

Issues:

1. Which employer is the last responsible maritime employer under the Act?
2. What is the extent of Claimant's covered hearing disability?
3. What is Claimant's Average Weekly Wage for calculation of his disability benefits?
4. What medical expenses and interest is Claimant entitled to?

FACTUAL BACKGROUND

Claimant was born in 1937. He is a married man. After graduating high school, Claimant joined the National Guard, where he served as a senior cook for eight years. He then worked as a riveter for Boeing for approximately ten years. TR at 58-60.

Employment History With Lockheed

Claimant worked for Lockheed from September 1966 to March 1983, for a total of 17 years. TR at 60-61. Lockheed constructed and repaired commercial and military ships. Claimant's first job with Lockheed was as a scaler, which involved cleaning ships. He later became a scaler/sandblaster, which involved using high pressure sand to remove the rust, paint and other materials off the metal. TR at 61. The area Claimant worked in was "noisy," but he did not wear hearing protection for most of his employment at Lockheed. TR at 62-63. Claimant started wearing hearing protection "towards the end" and "some time in the [19]70s or [19]80s [when] it became mandatory." TR at 62.

Claimant worked a steady 40 hours every week at Lockheed. He remembered that prior to November 1982, he earned $13.50 an hour, and after which he began to earn $13.51 an hour. Claimant remembered working Saturdays and Sundays every other weekend. On Saturdays, Claimant's overtime pay was 1.5 times the regular rate; on Sundays, his earned double-time. TR

at 63-64. Neither Claimant nor Employer have any documentation of Claimant's earnings from 1983, however Claimant remembered that towards the end of 1982, his paycheck showed that he had earned around $40,000 for that year, or $769.23 per week. The national average weekly wage for 1983 was $262.35. TR at 14.

Employment History with Local 252

Upon leaving Lockheed in 1983, Claimant became an independent manager for Seattle Ship Scalers Local 541 ("Local 541"), which merged with Laborers' Local 252 ("Local 252") in 1986. TR at 65. The majority of Local 252's members are construction workers; it has a total membership of about 2,400 involved in construction work. Its other members are involved in the ship repair industry and in federal government manufacturing. TR at 125. It has roughly 150 members who are employed in the shipyard industry and it refers members to work at various shipyards. TR at 126.

Claimant worked for Local 541 from March 1983 to April 1986. TR at 65. Claimant then became a business agent/field representative for Local 252, and worked in that capacity until his retirement in July, 2002. TR at 65. His job duties for Local 541 and Local 252 were the same, which was to help enforce collective bargaining agreements the union had with various shipyards, specifically by handling complaints and grievances that different employees brought to him. TR at 66-67.

When Claimant worked for Local 541, his home office was on 23rd and Madison, approximately six to seven miles away from the shipyard. TR at 68. While employed by Local 252, Claimant's office was approximately three to four miles away from the shipyards. TR at 68. Claimant testified that the "majority of the time," "at least 50 to 60 percent, maybe 70 percent of the time," he was in his office. TR at 68, 116.

Claimant worked in this capacity primarily at Todd Pacific Shipyards ("Todds") as well as at Lake Union Dry Docks and Duamish Shipyard. TR at 95-96.

When Claimant was not in the office, he was at various shipyards investigating complaints and resolving disputes, or was simply there to socialize and become familiarized with the work site. TR at 69, 135. The frequency of these visits was largely dependent on the need at the shipyard. Claimant testified that when there were no problems, he would visit the shipyard once a week. TR at 116-17. Mr. Don McLeod, who succeeded as field representation for Union 252 after Claimant's retirement, stated that when Claimant was training him, they went to the shipyard two to three times a week. TR at 144. Ms. Ada Beane, who worked for the Human Resources Department at Todds, testified that Claimant was at the shipyard several times a week. LX 9 at 13-14. Mr. Andrew Posewitz, who also worked for the Human Resource Department at Todds, stated that Claimant visited the shipyards "on average about two or three days a week." Posewitz DP at 25. Usually the visits lasted from one to two hours; when there was an arbitration, it would last around two to three hours. TR at 118-19.

Claimant identified five steps to the grievance procedure and his involvement in each one. He was not involved in the first step, where the shop steward received and investigated

complaints. TR at 69, 75, 142-43. The shop steward was an employee of the shipyard, but who also served as the union representative to investigate complaints. TR at 72. When the grievance could not be resolved, it was turned over to the personnel officers at the shipyard in step two. Claimant was notified at this step; he communicated with the shop steward, and met with the personnel officers to try to reach an understanding. If the grievance was not resolved at this step, Claimant notified the company. Step three involved referring the dispute to a panel, which Claimant typically skipped directly to step four. In step four, Claimant referred the grievance to a representative of the international union, who attempted to resolve the grievance. If the representative failed, the last step in the grievance resolution process, step five, was arbitration. TR at 69-71. Claimant continued to assist with the grievance resolution procedure through steps four and five. TR at 76.

When working with Todds, Claimant interacted with Mr. McGee, the shop steward, and various personnel officers including Ada Bean and Andrew Posewitz. TR at 73, 75. After learning of the grievance, Claimant first talked with Mr. McGee to gain some information about the grievances. Next, Claimant met with Todds' personnel officers at their office in the shipyard. TR at 73-74.

At Todds, there were four main locations where Claimant conducted his work. Mr. McGee, the shop steward, had his office near the shot house, which was a large, enclosed area where large pieces of equipment were sandblasted. TR at 132, 150-51. Employees were required to wear hearing protection while inside the shot house. TR at 132. Claimant met with Mr. McGee in his office outside the shot house; moreover it was during lunch time when all work ceased. TR at 155. Ms. Beane testified that Claimant entered the sandblasting facility while work was going on. LX 9 at 23.

Conference Room 3 was used for the weekly stewards' meetings which Claimant regularly attended. These meetings occurred during the half-hour lunch period when work ceased and it was not especially loud. If the meetings continued past 30 minutes, the participants could begin to hear forklift horns or similar noise. TR at 78-79. Mr. Posewitz explained in his deposition that Conference Room 3 was next to the Transportation Office, which operated as a stop for trucks and forklifts. Posewitz DP at 23. He described the Conference Room 3 as "loud." However, Claimant said that in Conference Room 3, they were "very seldom" disturbed by outside noise. TR at 79. Mr. McLeod also testified that they were "carrying on conversations, having meetings" in the room. TR at 139.

Claimant also spent time at the Labor Department, which was above the boiler room and pipe shop, and located near a main intersection where trucks and forklifts went by frequently. Posewitz DP at 21. Mr. McLeod described the Labor Department office as a place where it was "easy to carry on a conversation" even though the boiler room created some background noise. TR at 139.

The Administrative Building was an office building where the Human Resources Department and personnel officers had their offices. TR at 153-54. Arbitration also occurred in the Administrative Building. Claimant and Mr. McLeod testified there were no loud noises

there; however, Ms. Beane testified that the sound from the shot house would "cause problems in hearing and continuing a conversation." TR at 139, 141; LX 9 at 22-23.

There were no hazardous noise warning signs outside the Administrative Building, the Labor Department or Conference Room 3. TR at 137. Hearing protection was not worn in these areas. TR at 133.

When walking across the yard from one office location to another, hearing protection was not worn. Mr. McLeod testified that these paths were similar to small roads and the equipments that ran on them, forklifts, pick-up trucks, large trucks and cranes, all had muffled motors. He testified that such noise was comparable to common noise found on a city street. TR at 79, 133-34. Ms. Beane, however, testified that it was "not an uncommon occurrence" that her conversations in the yard were interrupted because of the noise. LX 9 at 22.

Sometimes Claimant went into the shipyard to find a specific worker to talk about his grievance or look at a situation. TR at 75, 77. However, it was against Todds' company policy for Claimant to board a vessel while work was in progress, and Claimant testified that he never boarded a vessel when employees were working. TR at 74-75, 121. Claimant stated that in the entire 19 years when he was a union representative, he boarded a vessel less than five times. TR at 74. However, Ms. Beane alleged that Claimant would board vessels to investigate different issues. LX 9 at 17.

Claimant never interfered with the shipyard employees' work, which was in fact a term in the collective bargaining agreement. TR at 108, 111. Claimant had no authority to order work stoppages. TR at 76, 120. Even when there was a jurisdiction dispute at a shipyard, the work continued as assigned by the employer; it was up to the employer to comply with the union council's ruling after the council determined the proper work assignment. TR at 136. Claimant did not talk to workers while they were working because that was not conducive to having a conversation. TR at 75. Claimant usually went to the shipyards during the workers' lunch time when they were not working, and talked to the workers in the lunch room or often in the shop steward's office. TR at 75, 130. The shipyard work could continue unaffected regardless of the union field representative's presence. TR at 113, 143.

At Local 252, Claimant received a weekly wage that equaled to $720.20. Claimant remembers his earnings at Local 252 to be less than his earnings as a sandblaster at Lockheed. TR at 66-67.

Hearing Disability

Claimant first started noticing hearing problems "sometime in the '70s." He described the problem as a ringing in his ears, which he said has continued for the last thirty years. TR at 79. Claimant recalled Lockheed testing him for hear loss, but he never received the results of the test. TR at 80-81.

On May 10, 2000, Jenny Primm, a licensed hearing dispenser and not a licensed or certified audiologist working for Lakeside Hearing Health Specialists, Inc., tested Claimant for

hearing loss. LX 4. Ms. Primm produced a report, which she opined resulted in a binaural hearing loss of 3.44%. TR at 18. Ms. Primm administered the test in her office, which was not an enclosed area. TR at 83. Her testing was also less extensive than the Ms. Muto-Coleman's in 2003 as Ms. Primm did not talk during the testing and omitted electronic beeps of different frequencies and volume, and the use of a tape recorder with voices from her testing. TR at 82-83. Claimant received hearing aids and wore them for two to three years until he misplaced them. TR at 82, 114-15. The hearing aids cost $3,200, of which Claimant paid $2,500. Claimant did not replace the hearing aids because of the cost. TR at 82. Claimant seeks reimbursement for the hearing aid and cost of Mr. Primm's evaluation as medical expenses. ALJX 8 at 12.

Claimant filed a claim for compensation for his hearing loss on June 15, 2000. OWCP gave notice to Lockheed and Liberty NW Insurance on July 14, 2000. CX 3 at 10-11. Lockheed conceded knowledge of injury on July 18, 2000, and filed a Notice of Controversion on August 2, 2000. CX 4 at 12.

Three years later, Claimant had his hearing tested on September 9, 2003, by Ms. Dorothy Muto-Coleman, a certified audiologist who had a Doctor of Audiology degree in 2003 from A.T. Still University in Mesa, Arizona and a masters degree in audiology and special education in 1978 from San Jose State University. CX 7-8. Ms. Coleman placed Claimant in a booth and conducted a pure tone audiogram and speech testing using voice stimuli. CX 11 at 31, 84. Ms. Coleman noted that Claimant had a "long-standing," or twenty years or more, gradual changes in terms of hearing loss. CX 11 at 34. She found binaural hearing losses of 17.81%. TR at 27-28. Ms. Muto-Coleman could not attest to the reliability of Ms. Primm's test. CX 11 at 35. Ms. Muto-Coleman believed that "in consideration of almost 20 years of loud noise exposure in the shipyards," Claimant's "audiometric configuration is consistent with noise induced hearing loss." CX 6; CX 11 at 35.

On October 13, 2003, Claimant's hearing was again tested, this time by Ms. Jennifer Moorman, a certified audiologist in Dr. Gregory Chan's office. Ms. Moorman also found that Claimant had binaural hearing losses of 17.81%. CX 10. Dr. Chan was a Board certified doctor in Otolaryngology who specializes in ear, nose, throat surgery and head and neck diseases since 1973. TR at 16. He received his medical degree from Marquette University and completed his residency at Medical College of Wisconsin. LX 7.

Dr. Chan provided a report of his findings on November 7, 2003, and testified at the hearing on September 14, 2004. Dr. Chan's expert witness report and testimony were based on a review of Claimant's audiogram test results by Ms. Primm and Ms. Muto-Coleman, information received from Lockheed's counsel, Mr. Russel Metz, and an interview and examination of Claimant on October 13, 2003. TR at 21; LX 6. Claimant provided Dr. Chan information about his work activities and noise exposure prior to 1983. TR at 34. Claimant stated to Dr. Chan that he first noticed hearing loss in 2000; but explained that it was because he did not realize he had a hearing problem before his audiogram by Ms. Primm. TR at 84. All information about Claimant's work and noise exposure after 1983 was provided to him by Mr. Metz in the form of a hypothetical question. TR at 25-26, 34-35, and 37. Dr. Chan's notes from a telephone call with Mr. Metz on November 3, 2003, stated that Claimant worked for "14 years as a union

business agent, he worked on all shipyards, exposed to noises, one hour twice a week and also in his office in the shipyard." TR at 36.

Dr. Chan expressed the opinion, based on the specification of Ms. Primm's equipment, the date of the equipment's calibration, and the pattern of Claimant's hearing loss configuration between Ms. Primm's audiogram and subsequent ones, that Ms. Primm's audiogram was reliable. TR at 19-21. Dr. Chan explained that the deterioration in Claimant's hearing could be caused by any or a combination of three factors: progressive noise exposure, aging, and medical conditions such as diabetes or high blood pressure. TR at 20, 30-31. Dr. Chan further stated that because most hearing loss accelerates in the first five to ten years of noise exposure, and significantly decelerates in the last five to ten years, he believed the significant drop in Claimant's hearing from 2000 to 2003 was more likely caused by a medical condition such as hypertension. TR at 48-49.

DISCUSSION

Claimant filed this suit to seek compensation against Lockheed for a work-related disability that he developed. In order to state a claim under the Act, Claimant is required to demonstrate that (i) he was engaged in "maritime employment;" (ii) an employer-employee relationship existed between him and Lockheed; (iii) his injury was causally related to his employment; and (iv) his injury entitled him to compensation under the Act. 33 U.S.C. §§ 902(3), (4), (2), (12) (2005).

Here, Lockheed conceded that from 1966 to 1983, it had an employer-employee relationship with Claimant. It also conceded that Claimant had maritime status and situs while employed by Lockheed; that the injury sustained arose out of the course and scope of Claimant's employment; and the Act applies to Claimant's injury as relates to Lockheed. Stips. Nos. 1-4; TR at 6-13. Claimant worked as a scaler/sandblaster without hearing protection for many years at Employer. TR at 60-62. Dr. Chan testified that a sandblaster without hearing protection more probably than not will sustain a hearing loss. TR at 55. Lockheed controverted its liability only in that Union 252, Claimant's subsequent employer from 1983 until his retirement in 2002, should be liable for the disability under the "last responsible employer" rule. Union 252, in response, argued that it was not a maritime employer, and therefore had no liability under the Act.

Credibility

The following conclusions of law are based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon the analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In arriving at a decision in this matter, I am entitled to determine the credibility of witnesses, to weigh the evidence, and to draw my own inferences from it; furthermore, I am not bound to accept the opinion or theory of any particular medical expert. *See Banks v. Chicago Grain Trimmers Assoc., Inc.,* 390 U.S. 459, 467, *reh'g denied,* 391 U.S. 929 (1968); *Todd v. Shipyards Corp. v. Donovan,* 300 F.2d 741, 742 (5th Cir. 1962); *Scott v. Tug Mate, Inc.,* 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988).

Claimant, Mr. McLeod, Ms. Beane, and Mr. Posewitz

I observed Claimant to be a very credible witness as to the facts and circumstances underlying the occurrence of his hearing loss and his exposure to noises from 1966-2002. Overall, I found Claimant's testimony more consistent with the testimony from Mr. McLeod.

Also Claimant was more believable because his testimony appealed more to logic and common sense than that provided by Employer's personnel Ms. Beane and Mr. Posewitz as to the degree of noise exposure Claimant experienced while working as a union representative after leaving Employer in 1983 through his retirement in 2002. For example, Claimant and others were much more credible in testimony that Claimant's offices were located outside and not inside the shipyards and that when he infrequently went to the shipyards, he would meet employees during their lunch hours or in administrative buildings where one can talk without the disturbance of loud noises from shipyard work. TR at 68, 74-75, 116-19, 130, 144. There was also credible testimony that Claimant would almost never board ships, that he would meet in Conference Room 3 where they very seldom were disturbed by outside noise and that meetings never took place in areas where there were posted signs requiring hearing protection. TR at 74-75, 78-79, 102-04, 111, 119-121, 130, 133, 139, 155, and 158.

As a result, I find Claimant's testimony credible that his exposure to damaging loud noises ended in 1983 when he left Employer and I find that his work for Local 252 did not expose him to levels of noise injurious to his hearing. I reject the testimony provided by Employer's personnel Ms. Beane and Mr. Posewitz as non-credible, inconsistent with Claimant's testimony, and contrary to common sense. See TR at 139, 141; LX 9 at 17, 22-23; and Posewitz DP at 23 and 25. I did not observe Ms. Beane or Mr. Posewitz as neither of them testified at trial so I did not get to view their demeanor or directly judge their credibility.

Moreover, Ms. Beane's testimony that Claimant was on vessels often is inconsistent with his work pass, which did not allow him on vessels. TR at 120-21. It is much more likely that a union representative in Claimant's former position would need to talk to workers when they were not actually performing their work and under conditions where they could hear each other to address union grievances as compared to meeting in a shot house where hearing protection was required in the years 1982-2002. *See* TR at 102-04. Thus, I reject as unsubstantiated and not credible, Employer's argument that after 1983, Claimant sustained hearing loss due to his continued exposure to noise.

Ms. Muto-Coleman

She was a certified audiologist who found binaural hearing loss of 17.81 percent for Claimant on September 10, 2003. I find Ms. Muto-Coleman's audiogram credible and reliable given her experience and qualifications as a certified audiologist. I also find her credible because her testing methodology was described and was more thorough than that presented for hearing aid dispenser Ms. Primm. For example, Ms. Mutro-Coleman applied bone conduction testing, a pure tone audiogram and presented voice stimuli with Claimant to confirm the pure tone testing. *See* CX 11 at 31 and 34.

Ms. Moorman

Ms. Moorman was a certified audiologist who also found binaural hearing loss of 17.81 percent for Claimant on October 13, 2003. I find her audiogram results reliable and consistent with Ms. Muto-Coleman's test results as they reached the same 17.821 percent binaural hearing loss for Claimant.

Dr. Chan

I reject Dr. Chan's opinions as to the causation of Claimant's hearing loss because he relied on inaccurate information to reach his opinions as supplied by Employer's counsel. For example, all information about Claimant's work and noise exposure after 1983 was provided to him by Mr. Metz in the form of a hypothetical question. TR at 23-26, 34-35, and 37. Dr. Chan's notes from a telephone call with Mr. Metz on November 3, 2003, stated that Claimant worked for "14 years as a union business agent, he worked on all shipyards, exposed to noises, one hour twice a week and also in his office in the shipyard." TR at 36. As referenced above, I find Claimant's testimony that he did not have an office at the shipyard and was not exposed to damaging loud noises in his work for Local 252 to be most credible.

Even Dr. Chan admitted that without knowing the intensity of noise exposure and the duration of the noise, he could not opine as to whether certain noise caused hearing loss. TR at 40-41. He did state that Claimant's exposure to noise as a sandblaster not wearing hearing protection probably accounted for his hearing loss but Dr. Chan could not say what exposure to noise Claimant had from 2000 to 2003. TR at 41-43, 55.

Dr. Chan also testified that Ms. Primm's May 2000 hearing test results were reliable because her equipment specifications were presumably good and she had calibrated the equipment on a date he knew about. TR at 18-19, 47-48. More importantly, however, Dr. Chan did not know Ms. Primm nor did he know of her qualifications or methodology. TR at 28. I find him not credible in his testimony that the fact that Ms. Primm might not have been a certified audiologist did not affect his opinion and view as to the reliability of her May 2000 hearing test results. *See* TR at 50.

Consequently, I reject Dr. Chan's opinions as to Claimant's post-1983 hearing loss and the reliability, credibility, or validity of Ms. Primm's testing results as these opinions were based on inaccurate or incomplete information.

Ms. Primm

Ms. Primm was a hearing aid dispenser who found a binaural hearing loss of 3.44 percent for Claimant on May 10, 2000. Ms. Primm was not a certified or licensed audiologist as required by the Act at 33 U.S.C. § 908(c)(13)(C). No one knows the skills of Ms. Primm as no evidence was presented regarding her methodology for testing Claimant's hearing in May 2000 and no one can confirm her experience, thoroughness, or accuracy in testing for hearing loss. TR at 28; CX 11 at 35. Claimant, however, stated that he did not recall being in a booth when Ms. Primm

tested him, and he thought that both Ms. Muto-Coleman and Ms. Moorman were more thorough. TR at 82-84.

I reject Ms. Primm's hearing test results because she was unqualified and not a certified or licensed audiologist when she tested Claimant's hearing as required by the Act and because her methodology is suspect as less thorough and unknown and there is evidence that she was not a thorough in her testing methods as Ms. Muto-Coleman or Ms. Moorman.

1. Which employer is the last responsible maritime employer under the Act?

Maritime Employment

An employer is covered under the Act if has any employee "engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . ." 33 U.S.C. § 902(3) (2005). The occupations listed in the statute are not exclusive; the "other person engaged in longshoring operations" category also incorporates any employment that is "an integral or essential part of loading or unloading a vessel." *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 47 (1989); *see P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 80 (1979). The "determinative consideration" of the "integral or essential" test is whether the employee's role is such that "the ship loading process could not continue" absent the employee's participation. *Schwalb*, 493 U.S. at 48. An employee is considered engaged in "maritime employment" as long as some of his duties constitute covered employment. *Schwalb*, 493 U.S. at 47 ("it is irrelevant that an employee's contribution to the loading process is not continuous . . ."); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 275-76 (1977). However, "maritime employment" is not to be interpreted so widely as to "eliminate any requirement of a connection with the loading or construction of ships." *Herb's Welding Inc. v. Gray*, 470 U.S. 414, 423-24 (1985); *McGray Constr. Co. v. Director, OWCP*, 181 F.3d 1008, 1012-13 (9th Cir. 1999).

Whether union activities constitute "maritime employment" has been analyzed in two recent cases. In *American Stevedoring Limited v. Marinelli*¸ the Court of Appeals of the Second Circuit found that a shop steward employed by the stevedoring company is engaged in "maritime employment" under *Schwalb*'s "integral or essential" test. *Martinelli*, 248 F.3d 54 (2nd Cir. 2001). The shop steward position existed solely by a term in the collective bargaining agreement between the stevedoring company and the union. He was paid by the stevedoring company but the company had no control over his activities. *Id.* at 57. The shop steward served as an arbitrator between the stevedoring company's management and the union members, had authority to enforce work rules specified by the collective bargaining agreement, and had authority to order a work stoppage if he believed the stevedoring company was causing union members to work under unsafe conditions. *Id.* The collective bargaining agreement required the shop steward to be present on the pier whenever stevedoring work was taking place; however, loading and unloading on the pier continued regardless of whether the shop steward was actually present. *Id.* The shop steward also worked directly on vessels regularly. *Id.* at 59. The Second Circuit noted that there was substantial evidence that the shop steward "resolved disputes that had the potential to interrupt loading and unloading operations" and that he "had the authority to

order a work stoppage," therefore it affirmed the ALJ's finding that "the ship loading process could not continue unless" the shop steward properly performed his duties. *Id.*

The Court of Appeals of the Fourth Circuit, however, distinguished *Marinelli* in *Sidwell v. Virginia International Terminals, Inc.*, and found in the later case that an officer of a union local that represented longshoremen was not engaged in "maritime employment." *Sidwell*, 372 F.3d 238 (4th Cir. 2004). In *Sidwell*, also a hearing loss case, the claimant was employed as the president of a union that represented longshoremen. He spent approximately one hour a week at locations where longshoring activities were taking place, and generally performed his duties from home in order to address specific issues and grievances. *Id*. at 240. The Fourth Circuit pointed out that Sidwell's responsibilities varied significantly from Marinelli's as the shop steward. Marinelli was "physically present at the piers and involved in day-to-day operations, mediation, and safety inspections of the waterfront operations;" whereas Sidwell "spent little time at the waterfront terminal." *Id*. at 243. However, the Fourth Circuit believed the pivotal difference between *Marinelli* and *Sidwell* was in the claimants' respective authority to stop work. "The 'determinative consideration' . . . is whether 'the ship loading process could not continue' without the employee's participation . . . This standard makes the capacity to interrupt ongoing longshoring activities paramount." *Id*. (quoting *Schwalb*, 493 U.S. at 48). The Fourth Circuit therefore concluded that although Sidwell's union role "clearly facilitated and was integral to the smooth workings of the waterfront," it did not "bear an integral relationship to the loading, unloading, building or repairing of a vessel," and therefore was insufficient to constitute "maritime employment." *Id.*

Here, Claimant's employment with Union 252 involved him in the five-step grievance resolution process, which Claimant personally participated in only after step one, where the shop steward made initial investigations of the grievances. TR at 69, 72, 75, 142-43. In Claimant's capacity as the field representative of Union 252, he worked in conjunction with the shop steward at the shipyards and with the personnel officers to resolve grievances. TR at 69-71. Claimant credibly testified he worked the "majority of the time," "at least 50 to 60 percent, maybe 70 percent of the time" at his office away from the shipyards. TR at 68, 116. Despite the conflicting testimonies about how often Claimant actually visited the shipyards—Claimant himself stated he went only once a week when there were no problems; Mr. McLeod stating that Claimant went with him to the shipyards "two to three times a week;"[1] and Ms. Beane testified that Claimant was at the shipyard several times a week; it nonetheless is apparent that Claimant's visits were generally in response to needs at the shipyard, and generally did not exceed two hours at a time. TR at 116-19, 144; LX 9 at 13-14.

A significant portion of Claimant's visits to the shipyards were also devoted to meeting with different personnel officers and the shop steward in administrative settings instead of being directly in areas where louder longshoremen work took place. TR at 73-75. Although Claimant's presence at the shipyard appeared slightly greater than Sidwell, who was at the waterfront only one hour a week; it was clearly not the same as Marinelli's, who as the shop

[1] Mr. McLeod testified that at that time, Claimant was training him as successor to Claimant's position at Union 252 and was familiarizing Mr. McLeod with the different shipyards. TR at 129. It is therefore plausible that Claimant visited the shipyards more frequently during that brief period.

steward was required by the terms of his employment to be present on the pier whenever loading and unloading was conducted.

More significantly, similar to Sidwell, Claimant's role as field representation did not give him authority to interrupt shipyard employees' work. The collective bargaining agreement between Todds and the union specified that the field representation was not to interfere with the shipyard employees' work. TR at 108, 111. Todd's company policy forbade Claimant from boarding a vessel when work was in progress. TR at 74-75, 121. Claimant had no authority to order a work stoppage. TR at 76, 120. At all times, even in the event of a dispute over proper work assignment, the shipyard work was to continue as the employer assigned until the union council arrived at a ruling, then it was upon the employer to comply with the union council ruling. TR at 136.

Based on these aspects of Claimant's role as field representation, I find that his presence did not affect the shipyard work, and that Claimant's employment with Union 252 did not constitute an "integral or essential part of loading or unloading a vessel in the ship loading process" as set forth by *Schwalb*. Therefore I further find that Union 252 was not a covered employer, and Claimant's employment with Union 252 did not come under the Act's definition of "maritime employment." As such, Union 252 has no liability to Claimant under the Act.

Last Responsible Maritime Employer

Under the "last responsible employer" rule, "the claimant's last employer is liable for all compensation due, even though prior employment may have contributed to the disability." *Metro. Stevedore Co. v. Cresent Wharf & Warehouse Co.*, 339 F.3d 1102, 1107 (2003); *see e.g. Ramsey v. Stevedoring Servs. of Am.*, 134 F.3d 954, 961 (9th Cir. 1998) (reaffirming that liability must fall on the last employer who could have contributed causally to claimant's disability); *Todd Pacific Shipyards v. Director, OWCP (Picinich)*, 914 F.2d 1317, 1319 (9th Cir. 1990); *Todd Shipyards v. Black*, 717 F.2d 1280, 1284 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). This rule prevents the claimant from delay in receiving compensation because of the difficulties connected with trying to appropriate liability among several employers. *Foundation Constructors v. Director, OWCP*, 950 F.2d 621 (9th Cir 1991).

However, when a subsequent employer who also contributed to the disability is not covered by the Act, the earlier employer covered under the Act may not escape its legal responsibility. *Black*, 717 F.2d at 1285 ("an employee's later exposure to injurious stimuli during a non-covered job does not absolve the last covered employer of liability for the employee's exposure or vitiate the compensatory purposes of the [Act]"); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159, 162 (1991) (holds the last covered employer was liable for claimant's disability regardless of whether it was aggravated by subsequent non-covered employment).

Here, because I have determined that Union 252 is not a covered employer, it has no liability under the Act. Since Lockheed does not otherwise dispute its liability,[2] it remains the responsible maritime employer for this claim even though I previously found that Claimant was not exposed to hazardous conditions at Union 252 that aggravated his disability.

Extent of Last Maritime Employer Lockheed's Liability

In occupational hearing loss cases, it is unclear as to what extent the last maritime employer is liable for an employee's hearing loss, when it was possibly further diminished by subsequent exposure at a non-maritime employment. Existing case law is ambiguous on this issue. On the one hand, there is judicial language to the effect that "the last covered employer is liable for the *totality* of the claimant's disability from the occupational disease, regardless of whether the disease was aggravated by subsequent non-covered employment," *Labbe*, 24 BRBS at 161 (emphasis added). On the other hand, in application all such cases inevitably felt a need to justify their reliance on a later audiogram on the lack of reliable evidence to reflect the employees' hearing loss upon leaving covered employment. *Id.* ("in the absence of credible evidence regarding the extent of claimant's hearing loss at the time he leaves covered employment, the ALJ may evaluate the evidence of record and rely on the most credible evidence in determining the extent of claimant's work-related hearing loss"); *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5, 7 (1991) ("the record contains no evidence reflecting the extent of claimant's hearing loss . . . when he left covered employment, and the earliest audiogram of record was administered in 1984").

In traditional occupational disease cases, the court has held the "last maritime employer" which exposed the claimant to hazardous work conditions liable for the totality of the claimant's disability despite subsequent harmful exposures at non-covered employment. In *Todd Shipyards v. Black*, where the employee was exposed to asbestos for three years while employed with maritime employer, and subsequently for 26 years with a non-maritime employer, the Ninth Circuit held the last maritime employer liable for the totality of the employee's work-related asbestosis despite the employee's continual exposure to asbestos in subsequent employment not subject to the Act. 717 F.2d. 1280. Despite criticisms of arguably unfair results, [3] courts have justified the application of the "last maritime employer rule" in occupational diseases cases involving long latency periods and medical difficulties in determining exact relationships between exposure and injury, stating that "requiring a worker injured under such circumstances . . . to prove proportionate liability might be tantamount to denying him any recovery whatsoever." *Id.* at 1285.

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[2] Lockheed concedes that Claimant had maritime status and situs while employed by Lockheed; that the injury sustained arose out of the course and scope of Claimant's employment; and that the Act applies to Claimant's injury as relates to Lockheed. TR at 6-8.

[3] Courts have acknowledged that the "last maritime employer" rule "undercuts the basic rationale of the last employer rule, that each employer will be a last employer a proportionate share of the time . . . Furthermore, since the last maritime or covered employer rule holds covered employers liable for exposures that took place after their liability otherwise ended, employers are precluded from limiting their liability by adjusting their conduct. There is a difference between holding employers (and their insurers) liable for injuries that took place before an employee was hired and for those that took place after an employee left covered employment." *Bath Iron Works v. Brown*, 194 F.3d 1, 7 (1st Cir. 1999) (internal citations omitted).

However, hearing loss, though technically classified as an occupational disease, is different from the Act's definition of an occupational disease which "does not immediately result in a disability or death." 33 U.S.C. § 912(a) (2005); *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 163 (1993) ("occupational hearing loss, unlike a long-latency disease such as asbestosis, is not an occupational disease that does not immediately result in . . . disability;" "whereas a worker who has been exposed to harmful levels of asbestos suffers no injury until the disease manifests itself years later, a worker who is exposed to excessive noise suffers the injury of loss of hearing . . . simultaneously with that exposure"). Notably, both *Labbe* and *Dubar* are decisions issued before the Supreme Court distinguished occupational hearing loss from traditional, long-latency occupational diseases. Both *Labbe* and *Dubar* relied on *Johnson v. Ingall*, a case involving asbestosis (i.e. an occupational disease which "does not immediately result in a disability or death"), for the language which attributed total liability to the last maritime time employer. *Labbe*, *supra*, at 161; *Dubar*, *supra*, at 7.

After the Supreme Court decision, in a case involving analogous issues as *Labbe* and *Dubar*, the Court of Appeals in the First Circuit explicitly refused to decide the extent of the last maritime employer's liability. *Brown v. Bath Iron Works Corp.*, 194 F.3d 1, 7 (1st Cir. 1999). In *Brown*, a hearing loss case, petitioner appealed from the Board's holding that the last covered employer was liable for the totality of disability despite subsequent exposure at a non-maritime employment. *Id.* After a lengthy discussion of the "last maritime employer" rule, the First Circuit specifically refrained from expressing an opinion of it. *Id.*

Considering the policy reasons that justify the allocation of total liability to the last maritime employers in traditional occupational disease cases, namely the difficulty in tracing the long-latency disease to the actual harmful exposure, the fact that occupational hearing loss is simultaneously manifested upon injury renders such an allocation rule inapplicable and inappropriate. Given the history of existing case laws, I find it reasonable to hold the last maritime employer liable not for the totality of an employee's occupational hearing loss, but only to the extent the maritime employer last exposed such employee to hazardous stimuli. Incidentally, that appears to be the rule the Board has consistently applied despite earlier contrary language. *See e.g. Labbe*, 24 BRBS at 161; *Dubar*, 25 BRBS at 7.

Finally, Dr. Chan could not testify how much of a role Claimant's diabetes or other conditions played in causing Claimant's hearing loss. TR at 48-50. Without this type of specific analysis, Claimant is entitled to his entire claim as a matter of policy. *See Port of Portland v. Director, OWCP*, 932 F.2d 836, 839-40 (9th Cir. 1991)(Claimant entitled to full compensation without reduction for the portion of his disability attributable to a possible age-related hearing loss.); *Newport News Shipbuilding and Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (4th Cir. 1982).

2. What is the extent of Claimant's covered hearing disability?

A "determinative audiogram" is that which best reflects the loss of hearing caused by a claimant's employment with the responsible employer, and is the best measure of his hearing loss. *Cox v. Brady-Hamilton Stevedoring Co.*, 25 BRBS 203, 208 (1991); *Mauk v. Northwest Marine Iron* Works, 25BRBS 118, 125 (1991).

There are three audiograms and two different measurements of binaural hearing loss in question in this case. The first was performed by Ms. Jenny Primm, a licensed hearing aid dispenser, on May 10, 2000; she found a 3.44% binaural hearing loss. CX 2. The second was performed on September 9, 2003, by Ms. Dorothy Muto-Coleman, a certified audiologist, who found a 17.81% binaural hearing loss. CX 6. The third was performed on October 13, 2003, by Ms. Jennifer Moorman, a certified audiologist who worked for Dr. Chan, who also found a 17.81% binaural hearing loss. CX 10.

Claimant contends that the latter two test results should be used as determinative evidence of his hearing loss upon last exposure at Lockheed, and that there was a lack of evidence suggesting exposure to increase hearing loss from the date of the first test, May 10, 2000, and the date of the second test, September 9, 2003. Lockheed, however, argues that the first test by Ms. Primm more accurately reflected Claimant's hearing loss and should be the determinative.

The Act provides that "an audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof;" if (i) it was "administered by a licensed or certified audiologist or a physician who is certified in otolaryngology;" (ii) the audiogram report was provided to the employee within 30 days; (iii) no contrary audiogram was produced within 30 days; and (iv) the audiometer used was calibrated according to current American National Standard Specifications ("ANSS"); and (v) the evaluator used the criteria set forth by the American Medical Association in the Guides to the Evaluation of Permanent Impairment ("AMA Guides"). 33 U.S.C. § 908(c)(13)(C) (2005); 22 C.F.R. § 702.411 (2005).

Of the three audiograms, only the latter two by Ms. Muto-Coleman and Ms. Moorman qualify as "presumptive evidence" as they were both certified audiologists. Lockheed conceded that Ms. Primm, who performed the first audiogram, was not a certified audiologist or a physician certified in otolaryngology as required by the Act. Lockheed, however, argues that the audiogram, though not presumptive evidence, was still entitled some weight if the test was reliable.

In support of their proposition, Lockheed relied on *In re: Leo Reinsalu v. General Dynamics Corp.*, 22 BRBS 17 (ALJ)(1988). Lockheed Post-Hearing Brief at 8. However, this reliance seemed misplaced as that case involved two audiograms that were both performed by certified audiologist. *Id.*

Nevertheless, it is true that an audiogram, even though insufficient to serve as presumptive evidence, is not automatically discredited.[4] Generally, an administrative law judge can weigh conflicting evidence and make credible determinations. *Uglesich v. Stevedoring Serv. of Am.*, 24 BRBS 180, 183 (1991).

[4] After the 1984 Amendment to the Act, § 8(c)(13)(E) was added to require that determination of hearing loss be made in accordance with the AMA Guides. *See West v. Port of Portland*, 20 BRBS 162 (1988). Section 8(c)(13)(C), on the other hand, only delineates when an audiogram, meeting certain above mentioned requirements, sufficiently qualifies as "presumptive evidence." 33 U.S.C. § 908(c)(13)(C) (2005). Therefore I find no authority to summarily disregard an audiogram because it fails to be "presumptive evidence."

In this case, both Ms. Muto-Coleman and Dr. Chan expressed their opinions of the reliability of the May 10, 2000, audiogram conducted by Ms. Primm. Dr. Chan believed that Ms. Primm's audiogram was "credible and can be validated" based on "information about her audiometer and the date of calibration," and because it showed a "configuration" that was "consistent" to Claimant's later audiograms performed in 2003. TR at 21, 47-48. However, Dr. Chan acknowledged that he did not know Ms. Primm's qualifications or the qualifications that Washington State required of its hearing aid dispensers. TR at 28, 47.

As referenced above, I find Dr. Chan's reliance on the calibration and type of audiometer Ms. Primm used an insufficient bases for his opinion. The relevant section in the Code of Federal Regulations requires that a certified audiologist administer an audiogram *and* a properly calibrated audiometer as two separate grounds for relying on the audiogram as "presumptive evidence" of the degree of hearing loss. 20 C.F.R. § 702.441. This requires that a properly calibrated audiometer does not substitute for the proficiency of the test administrator. The primary issue with the May 10, 2000 audiogram is the inadequate proficiency of the test administrator, Ms. Primm, which is not resolved by reliable machinery and proper calibration.

In this case, Ms. Muto-Coleman, like Dr. Chan, also acknowledged that Ms. Primm's test results indicated the same "general shape" of hearing loss that was consistent with her own test results. CX 11 at 35. However, Ms. Muto-Coleman explained that "there was no educational requirements for a licensed hearing instrument fitter/dispenser; however, [Washington State] did require passing of an exam;" and that this resulted in "a wide variety of levels of competency." CX 11 at 28-29. Ms. Muto-Coleman stated that she "can't attest to the reliability of the test by Ms. Primm." CX 11 at 35. In addition, because of the concerns "regarding the validity and the reliability of [the hearing aid dispensers'] test results," their patients were routinely referred to either a licensed or certified audiologist or an otolaryngologist for additional confirmation testing. CX 11 at 30.

I find Ms. Muto-Coleman's expressed reservation about the reliability of Ms. Primm's audiogram consistent with existing case law. When an audiogram was not administered by a certified audiologist, case law has not considered it probative evidence of the degree of hearing loss even when it was closer to the time of last exposure in question. *See e.g. Steevens v. Umpqua River Navigation*, 35 BRBS 129, 130 (2001) (claimant's last exposure was in 1975 and had four audiograms performed in 1985, 1992 and two in 1998; ALJ discredited the 1985 and 1992 audiograms because they lacked certain measurements required by the AMA Guides and did not identify the status of the tester or the testing equipment used); *Dubar*, 25 BRBS at 8 (claimant last worked at a covered employment in 1971 and had hearing tests in 1984, 1986, and 1988; ALJ was within his discretion to find the 1988 test more reliable because it included an audiogram and the identity of the test administrator, who was a certified audiologist); *Labbe*, 24 BRBS at 160, 62 (claimant last worked at covered situs in 1963, and had hearing tests in 1967 and 1986; the ALJ discredited the 1967 audiogram "on the basis that it failed to indicate the credentials of the tester"). This indicates the judicial importance placed on the reliability of the test administrator and the test condition more than a simplistic attention to the closeness in time between the audiogram and the date of last exposure.

Lastly, Claimant remembered that Ms. Muto-Coleman's testing in 2003 was "a little more extensive" than Ms. Primm's in 2000, and that Ms. Primm apparently administered the audiogram in an open location instead of an enclosed booth. TR at 82-83. This provides additional reason to reject the May 9, 2000, audiogram results.

Based on the above reasons, I do not find sufficient support to consider Ms. Primm's May 10, 2000 audiogram as reliable evidence.

Since there is no other reliable evidence as to the extent of Claimant's hearing loss other than the 2003 audiograms administered by Ms. Muto-Coleman and Ms. Moorman, who were both certified audiologists and both found a 17.81% binaural hearing loss, I find this the most reliable reflection of Claimant's degree of hearing loss upon his last exposure at Lockheed. As Ms. Muto-Coleman's test was closer in time to Claimant's last exposure at Lockheed, I find her September 9, 2003, audiogram to be the "determinative audiogram."

3. What is Claimant's Average Weekly Wage for calculation of his disability benefits?

Occupational hearing loss is a scheduled injury and compensable under § 8(c)(13) of the Act, which provides that for a loss of hearing in both ears, a claimant is entitled to 200 weeks of his average weekly wage. 33 U.S.C § 908(c)(13)(B) (2005); *Bath Iron Works Corp.*, 506 U.S. at 165. For occupational hearing loss claims, the date of last exposure is the relevant time of injury for calculating a retiree's benefits under the Act. *Id.*; *Ramey v. Stevedoring Servs. of Am.*, 134 F.3d 954, 962 (9th Cir. 1998).

In this case, the date of last exposure is when Claimant left employment at Lockheed in March 1983. TR at 60-61. Therefore that was the relevant time for determining Claimant's average weekly wage ("AWW") for purpose of calculating his benefits.

Section 10(a)

The parties dispute Claimant's AWW at last exposure. Claimant testified specifically as to the hours he worked and his hourly rates prior to leaving Lockheed in March 1983. Lockheed, however, argues that Claimant's figures were unreliable and that 1983's national average weekly wage should be used instead.

Section 10 of the Act sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to § 10(d), to arrive at an average weekly wage ("AWW"). 33 U.S.C. § 910 (2005). The first method, § 10(a), applies to an employee who has worked "in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a). When the employment is "permanent and continuous," it merits a § 10(a) calculation. *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982), *vacated in part on other grounds*, 462 U.S. 1101 (1983).

In this case, Claimant's employment with Lockheed prior to 1983 as a sandblaster involved a "steady 40 hours" work week and frequent overtime work on Saturdays and Sundays.

TR at 63-64. Lockheed attempted to show that Claimant had various periods of absence from work in 1983; however, Claimant denied that and credibly stated he "had a perfect record that last year." TR at 86-89. Subsequently Lockheed did not rebut Claimant's testimony and did not continue its argument any longer, nor did it provide any evidence supporting its allegation. Therefore, I find that Claimant's work was "permanent and continuous" and he worked "during substantially the whole of the year" immediately preceding his last exposure in March 1983.

However, § 10(a) calls for a calculation of a claimant's average daily wage, which is then multiplied either by 260 for five day worker or 300 for a six day worker to yield an annual earning. 33 U.S.C § 910(a). When it is unclear whether an employee is a five day or six day worker, or there is insufficient evidence to determine an average daily wage, § 10(a) cannot be applied. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 104 (1991) (§ 10(a) cannot be used because it was not clear whether claimant was a five or six day worker); *Lobus v. I.T.O. Corp of Baltimore*, 24 BRBS 137, 140 (1990) (claimant's commission from real estate sales is intermittent and not on a *per diem* basis; therefore, "section 10(a) cannot be applied where there is no evidence of record from which an average daily wage can be calculated"); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489, 494-95 (1981) ("the Section 10(a) formula requires evidence from which an average daily wage can be determined. Where there is no such evidence, Section 10(a) cannot be utilized").

Here, Claimant remembered he worked "just about every other weekend, if not every weekend," which included Saturdays and Sundays. TR at 63-64. Claimant made no argument either way that he should be considered a five day or six day worker. In a similar case, the Board found that a claimant, who "often worked overtime on Saturday but not on enough Saturdays to be classified as a six day worker," cannot be fairly treated either as a five day or six day worker, and concluded that the average weekly wage ought to be calculated under § 10(c) to "[take] this irregular pattern of Saturday overtime into consideration and [represent] a reasonable approximation of claimant's wage-earning capacity." *Eleazer v. General Dynamics Corp.*, 7 BRBS 75, 79 (1977). Given the close parallel between Eleazer and Claimant's work patterns, I similarly find that although Claimant worked for "substantially the whole of the year" in permanent and continuous employment prior to March 1983, Claimant's AWW cannot be calculated pursuant to § 10(a).

Section 10(b)

Where § 10(a) is inapplicable, application of § 10(b) must be explored before resorting to application of § 10(c). *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" prior to his injury. It looks to the average daily wage of "an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place." 33 U.S.C. § 910(b); *Duncanson-Harrelson*, 686 F.2d at 1342.

Section 10(b) does not apply in this case because Claimant did work "substantially the whole of the year" prior to March 1983. In addition, although Lockheed offered the national average wage in 1983 as a figure for calculation, there is no evidence that such reflected the

earnings of "an employee of the same class" that was comparable to Claimant's specific employment.

Section 10(c)

When neither § 10(a) and § 10(b) can be "reasonably and fairly applied," § 10(c) simply mandates that an average annual earning be determined which would "reasonably represent the annual earning capacity of the injured employee." 33 U.S.C. § 910(c); *see Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176 (9th Cir. 1976) (§ 10(c) is used when there is insufficient evidence in the record to make a determination of average daily wage under either subsection (a) or (b)). Factors to consider in a § 10(c) determination include "previous earnings of the injured employee in the employment in which he was working at the time of the injury;" and "other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality" *Id.* The objective of § 10(c) is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of the injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991).

The parties acknowledged that there was no record reflecting Claimant's earnings in 1982 and 1983. TR at 64, 91. At the hearing, Claimant gave oral testimony describing his hourly rate and how much he worked. However, Lockheed challenged Claimant's testimony based on the lack of verifying evidence in the record. TR at 90-91.

It is clear that factual determinations, including a claimant's AWW, need to be based on substantial evidence. *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052, 1059 (1978) (evidence of the claimant's income that was "presented at the hearing through mere oral guesswork . . . falls far short of the substantiality required by the Act"). However, case law does not require that actual wage records be available. *See Eleazer*, 7 BRBS at 79. Accordingly, I find that the lack of supporting evidence regarding Claimant's testimony does not render it unreliable per se. *See e.g. Carle v. Georgetown Builders, Inc.*, 14 BRBS 45, 51 (1980) (a claimant's testimony can be considered substantial evidence); *Mattera v. M/V Mary Antoinette, Pac. King, Inc.*, 20 BRBS 43, 45 (1987) (a judge may discredit a claimant's testimony if it appears unreliable).

Claimant testified that prior to November 1982, he earned $13.50 an hour, and after which he began to earn $13.52 an hour. TR at 63, 88. Claimant remembered working Saturdays and Sundays at least every other weekend, as well as working ten or twelve hour days on weekdays. On Saturdays, Claimant's overtime pay was 1.5 times the regular rate; on Sundays, he earned twice his regular rate. TR at 63-64. Claimant remembered that his earnings 1982 were "around $40,000;" and that his earnings then were more than his salary at Union 252. TR at 64. On the other hand, Lockheed argued that Claimant's testimony was unreliable because his earnings could not have been $40,000 even using his own calculations. TR at 90-91.

However, upon a closer examination, Claimant's figures did stand to the test of calculation. Taking Claimant's pre-November 1982 hourly rate of $13.50, his annual earning based on a 40-hour week computes to $28,080. If he worked every other weekend at 1.5 times his regular hourly rate for Saturdays and double his regularly hourly rate for Sundays, his total

overtime earnings for that year would compute to $9,828.[5] Together Claimant's annual earning for 1982 would be $37,908, for which $40,000 was not an unreasonable approximation. Additionally, Claimant stated that he likely worked more than every other weekend, and often worked overtime on weekdays as well, which if taken into consideration would yield an even closer figure to $40,000[6].

Claimant stated that as a field representation for Union 252, he earned a flat salary that equaled 40 hours at $13.85 an hour plus 8 hours of overtime rates. TR at 66-67. This would yield a weekly wage of $720.20[7]. Since the above figure of $37,908 would yield a weekly wage of $729, this is consistent with Claimant's testimony that he took a pay cut when he first joined Union 252 in 1983.

Lockheed also suggested that Claimant's testimony regarding his earnings at the hearing was more embellished than it was at his deposition. TR at 88-91. Claimant seemed unable to ascertain a figure for his annual earnings in 1982 both at deposition and at the hearing. TR at 88, 90-91. However, I find that Claimant's testimony at the hearing consistently indicated that he had a reliable recollection of his hourly rate and the amount of time he worked and was not oral guesswork. Claimant also explained that he never calculated his annual earnings from his hourly rates. TR at 90. I find this explanation credible for Claimant's apparent uncertainty about his actual annual earnings, and do not find Lockheed persuasive in its attempt to question Claimant's credibility. However, for this reason, I do find that Claimant's recollection of earning "around $40,000" in 1982 was loosely construed and should not be relied upon as an actual earning figure.

Generally, the party contending that actual wages are not representative bears the burden of showing evidence to the contrary. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 1179 (9th Cir. 1976). Since Lockheed did not dispute the hourly rates Claimant alleged to, nor offered any evidence to disprove or cast doubt on Claimant's testimony, I find no reason to discredit Claimant's testimony.

Notably, I find the only alternative Lockheed offered in place of Claimant's testimony in determination of his AWW only led to inequitable results. Lockheed contended that a more appropriate figure for the calculation of Claimant's average weekly wage was the national average weekly wage in March 1983, which was $262.35. TR at 14.

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[5] This takes into account 26 full days (8 hours a day) of Saturday overtime at 1.5 times Claimant's regular hourly rate ($13.50 X 1.5 = $20.25/hour) , and 26 full days of Sunday overtime at 2 times Claimant's regular hourly rate ($13.50 X 2 = $27/hour); $20.25 X 8 hours X 26 Saturdays + $27 X 8 hours X 26 Sundays = $9828. Lockheed indicates that Claimant's overtime according to his own recollection would only compute to $1,200; which is apparently inaccurate. Lockheed Post-Hearing Brief at 4.

[6] Claimant's counsel performed a similar calculation using a post-November 1982 hourly rate of $13.52, one day of overtime a week and two hours of overtime one day a week, both at 1.5 times Claimant's regular wage. This calculation yielded a weekly wage of $743.60. Claimant's Closing Brief at 9. I did not follow Claimant's calculation because Claimant's testimony regarding his overtime work during weekdays was very vague; he stated, "Quite a few mornings we would actually come in at 4:00. Sometimes it was 10-hour days and sometimes it was 12-hour days." TR at 64. I find this general statement less suitable as a basis for calculating Claimant's earnings than his more definitive testimony that he worked "every other weekend, for sure." TR at 63.

[7] Claimant again conducted a similar calculation but using $13.87 as the hourly rate, but generally reached the same conclusion as my calculation. Claimant's Closing Brief at 10.

Section 10(c) does provide that in determining an average annual earning, comparable earnings of "other employees of the same or most similar class" may be considered. 33 U.S.C. 910(c). However, there was no evidence that the national average weekly wage was representative of someone in Claimant's particular line of work. Contrarily, Claimant's weekly wage at the rate he testified to before including any overtime was already $540, a number significantly higher than the national figure. Given the intent of the Act of reach a "fair and reasonable" approximation of a claimant's wage-earning capacity, I find the national average weekly wage figure an unfair representation of such in Claimant's situation.

Based on all the above reasons, I find it reasonable to use the above figure of $37,908, based on Claimant's testimony regarding his regular and overtime rates, as well as the hours of his employment, as his average annual earning at the time of his last exposure at Lockheed in March 1983. Pursuant to § 10(d), this annual earning is divided by 52 to yield an average weekly wage of $729. Based on a 17.81% binaural hearing loss, § 8(c)(13)(B) of the Act entitles Claimant to 17.81% of 200 weeks of his AWW at $729.

5. <u>What medical expenses and interest is Claimant entitled to?</u>

Claimant seeks reimbursement for the medical expenses accumulated from his evaluation by Ms. Primm and the hearing aids he purchased in May 2000. ALJX 8 at 12. However, the Act requires that a claimant first request to receive certain medical treatment or services before it can recover such expenses in the event that the employer refuses or ignores the request. 33 U.S.C. § 907(d)(1) (2005). Furthermore, the § 7(d) requirement for prior request is not excused because a claimant was not aware that his illness was work-related at the time of seeking outside treatment. *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162, 171-172 (1982). Before an employer is considered to have neglected to provide care, there must first be a request for such care. *Jackson v. Navy Exch. Serv. Center*, 9 BRBS 437 (1978). If an employer has no knowledge of injury, it cannot have neglected to provide treatment and the employee is therefore not entitled to reimbursement for any money spent before notifying the employer. *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983).

Here, Claimant was evaluated by Ms. Primm and purchased hearing aids in May 2000. Lockheed first became notified of Claimant's injury on July 18, 2000. CX 4 at 12. Claimant did not make a prior request to Lockheed before receiving Ms. Primm's medical service, nor before he purchased the hearing aids. Therefore Claimant's request for reimbursement of medical expenses is denied by clear statutory language and case law.

Claimant next seeks interest for the due compensation starting from August 1, 2000. Interest begins to accrue from the date compensation becomes due, which is 14 days after notice to the carrier of work-related injury and request for compensation. *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996). Lockheed concedes that it received notice of Claimant's injury and claim on July 18, 2000. Lockheed timely controverted the claim on August 2, 2000, and subsequently did not pay any compensation. CX 4 at 12. Within 14 days, compensation becomes due, and if it is not paid will begin to accrue interest. Therefore, Claimant is entitled to interest from the delayed compensation beginning on August 1, 2000.

CONCLUSIONS

Claimant suffered a binaural hearing loss of 17.81% from his prolonged exposure to hazardous levels of noise while employed at Lockheed Shipbuilding from September 1966 to March 1983. His hearing loss is covered by the Act. Because Claimant's subsequent employer, Union 252, is not a "maritime employer" within the meaning of the Act, it is not the last responsible maritime time employer and has no liability under the Act. Alternatively, I find that Claimant's injury was not aggravated while he was employed by Union 252, from March 1983 to July, 2002. This is a scheduled injury and Claimant is entitled to compensation under § 8(c)(13) of the Act based on an average weekly wage of $729 at the time of his last exposure at Lockheed Shipbuilding in March 1983. Claimant is not entitled to reimbursement for prior medical expenses before notice to the employer. However, Claimant is entitled to interest on due compensation within 14 days of notice to the employer of work-related injury, which was August 1, 2000.

ORDER

Based on the findings and conclusions set forth above, it is hereby **ORDERED** that:

1. Lockheed Shipbuilding/Liberty NW Insurance Company shall pay Claimant permanent partial disability benefits for a 17.81% binaural hearing loss based on an average weekly wage of $729;

2. Lockheed Shipbuilding/Liberty NW Insurance Company shall pay interest on all due but unpaid compensation from August 1, 2000, the date the compensation became due, until the date of actual payment;

3. The District Director shall make all calculations and periodic adjustments necessary to implement this Order;

4. Counsel for Claimant shall prepare and serve an initial Petition for Fees and Costs on the undersigned and on the Respondents' Counsel within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, Respondents' Counsel shall initiate a verbal discussion with Claimant's Counsel in an effort to amicably resolve any dispute concerning the amount requested. If the two counsels agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsels fail to amicably resolve all of their disputes, Claimant's Counsel shall, within 30 calendar days after the service of the initial fee petition, provide the undersigned and Respondents' Counsel with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussion with the Respondents' Counsel, and shall set forth in the Final Application the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, Respondents' Counsel shall file and serve a Statement of Final Objections. No further pleadings will be accepted unless specifically authorized in

advance. For purposes of this paragraph, service of a document will be the date it was mailed;

5. The parties shall notify this Office immediately upon the filing of an appeal.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California